1014.

SUPREME COURT OF THE UNITED STATES.

No. 131.

MOSES C. MORDECAI, ISAAC E. HERTZ, JOSEPH A. ENSLOW, AND ISAAC R. MORDECAI, A FIRM DOING BUSINESS UNDER THE NAME AND STYLE OF MORDECAI & CO., LIB'TS AND APP'TS,

vs.

W. AND N. LINDSAY, OWNERS OF THE SCHOONER "MARY EDDY," &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

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In the Admiralty.

THE UNITED STATES OF AMERICA,
South Carolina District.

Pleas before the Honorable Robert B. Gilchrist, Judge of the District Court of the United States, for South Carolina District.
It is thus contained:

Be it remembered, that on the sixth day of April, A. D., 1854, comes into Court Messrs. Brown & Porter, attorneys of the said Court, and exhibit a libel in the case of

Libel.

MORDECAI & COMPANY
vs.
SCHOONER "MARY EDDY."

And the same being read and filed, is in the words following, to wit:
Mordecai & Company, consisting of Moses C. Mordecai, Isaac E. Hertz, Joseph A. Enslow, and Isaac R. Mordecai, exhibit this libel in a case of contract, civil and maritime, against the schooner "Mary Eddy," now lying at the port of Charleston, in the district aforesaid, and within the admiralty and maritime jurisdiction of this Honorable Court, whereof J. W. Hinckley now is, or lately was, master, her boats, tackle, apparel, and furniture, and against all persons intervening for their interest therein. And thereupon the said Mordecai & Co. do allege and articulately propound as follows:
First. That on or about the 15th day of March, 1854, the said schooner "Mary Eddy," whereof the said J. W. Hinckley was master, being then in the port of New Orleans, State of Louisiana, and designed on a voyage upon the high seas, and within the flux and reflux thereof, and within the admiralty and maritime jurisdiction of this Honorable Court, to wit, from the said port of New Orleans to the port of Charleston, State of South Carolina,—Hall & Rodd, of the said port and city of New Orleans, made a contract with the said J. W. Hinckley, as such master, whereby he agreed, in consideration of certain freight, to convey eighty hogsheads of sugar, and also twenty-two hogsheads of sugar, of the value of six thousand dollars, from the said port of New Orleans to the said port of Charleston, and there to deliver the same in good order and condition to the libellants Mordecai & Company, saving and excepting only the dangers and accidents of the seas and navigation, of whatever nature and kind. And that the said Hall & Rood, on the

same day, delivered to the said master the said sugars, in good order, and received a bill of lading therefor, which they transmitted to the said libellants.

Second. That the said libellants, Mordecai & Co., are interested and have a property in said sugars.

Third. That the said sch'r Mary Eddy shortly afterwards departed on her said voyage; but the said master, as aforesaid, not regarding his duty in that respect, nor his promise and undertaking to convey and deliver the said sugars, (altho' no dangers or accidents of the seas or navigation prevented him from so doing,) but, on the contrary thereof, hath neglected and refused to deliver the said hogsheads of sugar, although the said libellants have offered to pay the freight upon the delivery of the same, in accordance with the bill of lading; by reason whereof, the said libellants have sustained damage to the amount of six thousand dollars, for which they claim reparation in this suit.

Fourth. That the premises are correct and true.

Wherefore, the libellants pray that process in due form of law may issue against the said schooner Mary Eddy, her boats, tackle, apparel, and furniture, and that this Honorable Court will pronounce for their aforesaid demand, and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice may appertain, and as the Court is competent to give in the premises.

MORDECAI & CO.,
J. E. HERTZ.
BROWN & PORTER,
Libellants' Proct'rs.

Sworn to 5 April, 1854.

H. Y. GRAY,
Dist. cl'k.

Warrant.

Let a warrant of arrest issue, returnable to-morrow, 7th April, at 11 o'clock a. m.

R. B. GILCHRIST, *D. J.*

At Chambers, 6th April, 1854.

April 7th, 1854.

The Court met, &c. Present, his Honor R. B. Gilchrist.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

The marshal returned that he had arrested the sch'r Mary Eddy, as commanded.

Monition.

Ordered, that a monition issue, returnable on Wednesday next, at 11 o'clock a. m.

Order to take testimony.

With the consent of Messrs. Brown & Porter, libellants' proctors, and on motion of Mr. Ellis De Treville, deft's proctor, it is ordered that this case be referred to Mr. Commissioner Gilchrist to take testimony, and report the same to this Court.

WEDNESDAY, 10 *April*, 1854.

The Court met, &c. Present, his Honor R. B. Gilchrist.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

The marshal returned the monition in this case, and proclamation was duly made.

Claim and answer of J. W. Hinckley.

Claim and answer.

THE UNITED STATES OF AMERICA,
South Carolina District:

In Admiralty.

To the Honorable Robert B. Gilchrist, Judge of the District Court of the United States, in and for the District of South Carolina:

And now comes Jacob W. Hinckley, master of the said schooner, "Mary Eddy," and for answer to the libel of Mordecai & Company against the said schooner, doth allege and articulately propound as follows:

First. That W. N. Lindsay are the true and bona fide owners of the schooner Mary Eddy, and that he, the said Jacob W. Hinckley is now the master of the said schooner, and as such master has the possession and is the lawful bailee thereof for the said W. N. Lindsay.

Second. And this respondent, for answer to the first article of the said libel, answers, that the truth and fact was and is, that on or about the 15th day of March, 1854, the said Hall and Rodd made a contract with this respondent, as master of the said schooner, whereby this respondent agreed, in consideration of certain specified freight, to convey eighty hogsheads of sugar, marked *A*, (N 4;) and twenty-two hogsheads of sugar, marked Velasco, *A*; and twenty-one barrels of golden syrup, (the aggregate value of which this respondent does not know,) from the said port of New Orleans to the said port of Charleston, and there to deliver the same to the said Mordecai & Company, in the manner and on the terms and conditions as set forth in the said bill of lading given by this respondent

to the said Hall & Rodd, a copy of which said bill of lading is hereto annexed: that the other matters contained in the first article of said libel this respondent admits.

Third. To the second article of the said libel, this respondent answers, that whatever property the said libellants may have in said sugars, this respondent believes, and doth allege and propound, that the same is subject to the lien of this respondent for the specific agreed upon in the bill of lading aforesaid.

Fourth. That as to the matters contained in the third article of said libel, the truth and fact is, and this respondent doth allege and propound, that the said sch'r Mary Eddy, having proceeded on her said voyage, arrived at Charleston aforesaid, on the 31st March last, with the said sugars and syrup in good order on board; and this respondent, as master aforesaid, immediately gave notice to the said Mordecai & Co. of the arrival of the said Mary Eddy, and of the sugars and syrup aforesaid, so laden on board thereof, and offered to deliver the said sugars and syrups in good order to the said Mordecai & Co., upon the payment of the freight due thereon, according to the aforesaid bill of lading.

Fifth. And for further answer to the third article of said libel, the truth and fact was and is, and this respondent doth further allege and propound, that afterwards, to wit, on the 3d and 4th days of April inst., the said Mordecai & Co., having received at the wharf where the said schooner had landed them, the twenty-one barrels of syrup aforesaid, and three hogsheads of the sugars aforesaid, and taken the same into their possession, and drayed them off to their store, refused to pay the freight due on the said syrups and the three hogsheads of sugars aforesaid; that thereupon this respondent declined to deliver the residue of the said sugars to the said Mordecai & Co., until the freight due thereon, as well as the freight due on the delivery aforesaid, was paid or secured to this respondent.

Sixth. That afterwards, to wit, on the 4th of April, the said freight due on the said twenty-one barrels of syrup and the said three hogsheads of sugar, as well as on the residue of said sugars, not having, in the meantime, been paid or secured, and the said Mordecai & Co. having declined and refused to pay the said freight until the said sugars were removed by them to their store, or until possession of the same had passed to them, this respondent, master aforesaid, proceeded to unload the said residue of sugars, and when landed on the wharf, this respondent gave reasonable notice of the same to the said Mordecai & Co., and that the same would be delivered to them in good order on the payment of the freight due thereon; and the said Mordecai & Co., refusing to pay the said freight, or to give security for the payment of the same, and to the end that the lien of this respondent upon said sugars might not be lost, this respondent retained and still retains the same in his custody.

Seventh. That this respondent has at all times, since the arrival of the said schooner at the port of Charleston aforesaid, been ready and still is ready to deliver the said sugars, or cause the same to be delivered, to the said Mordecai & Co., on their paying or securing the freight due thereon.

Eighth. That the said Mordecai & Co. have not paid to this respondent the aforesaid freight, or any part thereof, tho' often requested to do so; but on he contrary, utterly neglect and refuse to pay the same.

Ninth. That all, and singular, the premises are true.

Wherefore, this respondent prays this Honorable Court would be pleased to pronounce against the libel aforesaid, and condemn the libellant in costs, and otherwise right and justice administer in the premises.

E. DE TREVILLE,
Respondent's Proctor.
JACOB W. HINCKLEY.

Sworn to before me this 10th April, 1854.
R. C. GILCHRIST,
U. S. Comm'r.

Stipulation.

THE UNITED STATES OF AMERICA,
South Carolina District.

Know all men by these presents, that we, J. W. Hinckley, master of the American schooner Mary Eddy, and Thomas S. Budd, merchant, of the city of Charleston, in the district aforesaid, are held and firmly bound unto Thomas D. Condy, marshal of the United States for the district of South Carolina, in the full and just sum of twelve thousand dollars, to be paid to the said Thomas D. Condy, as marshal aforesaid, his certain attorney, successor in office, or assigns; to which payment, well and truly to be made and done, we bind ourselves, and every of us, our and every of our heirs, executors, and administrators, for the whole, and in the whole, jointly and severally, firmly by these presents. Sealed with our seals, and dated at Charleston, in the district aforesaid, the tenth day of April, in the year of our Lord one thousand eight hundred and fifty-four, and in the 78th year of the independence of the United States of America.

Whereas, a warrant has been issued from the District Court of the United States for the district of South Carolina, holding admiralty jurisdiction against the American schooner Mary Eddy, whereof the said J. W. Hinckley is master, in a cause of civil and maritime jurisdiction, wherein Moses C. Mordecai, Isaac E. Hertz, Joseph A. Enslow, and Isaac R. Mordecai, called Modecai & Co., are libellants; and whereas, the said sch'r Mary Eddy, has been

arrested, and is in the custody of the marshal of the said district; and whereas the said J. W. Hinckley is desirous of releasing the said sch'r Mary Eddy from arrest, under the provisions of the act of Congress of the United States, approved the 3d of March, in the year of our Lord one thousand eight hundred and forty-seven, and the said J. W. Hinckley and Tho's S. Budd, have become security under the said act:

Now the condition of the above obligation is such, that if the said J. W. Hinckley shall abide and answer the decree of the said Court in the said cause, then the above obligation to be void and of no effect, or else to remain in full force and virtue.

JACOB W. HINCKLEY, [L. S.]
THO'S S. BUDD, [L. S.]

Signed, sealed, and delivered in presence of—
JULIUS A. BLAKE.

Hearing of the case.

WEDNESDAY, 3d May, 1854.

The Court met, &c. Present, his Honor R. B. Gilchrist.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

Mr. Porter read the libel. Mr. De Treville read the answer.

The commissioner's report of the testimony was read, (which vide post, p. 11.)

Mr. Porter was heard on the part of the libellants.

Adjourned.

THURSDAY, 4th May, 1854.

The Court met, &c. Present, his Honor R. B. Gilchrist.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

Mr. De Treville was heard on the part of sch'r Mary Eddy, and Mr. McCrady was heard in reply for the libellants.

Court adjourned.

Copy of the evidence taken before Commissioner Gilchrist, under an order of reference,

In the case of MORDECAI & Co.
vs.
Schooner MARY EDDY. } *Libel.*

Present—Mr. Porter, for libellants,
" " E. De Treville, for respondent.

James Salvo, sworn, says:—That he is a clerk of Mordecai &

Co. Witness went down to the Mary Eddy on Tuesday, the 4th of April, about 10½ o'clock, for the purpose of getting Mr. Mordecai's consignment, which consisted of 102 hogsheads of sugar and 21 barrels of syrup. Saw the captain of the Mary Eddy. Witness asked the captain for Mr. Mordecai's sugars. The captain said, that the last time Mr. Mordecai had given him a great deal of trouble, and he could not deliver the sugars unless the freight was paid on the wharf. Witness then returned to the office, and not finding his employer, he returned to the vessel. The captain left the vessel with witness, and went to Captain Budd's office. T. S. & T. G. Budd were the consignees. The captain went up stairs, and in a short time returned, saying that Captain Budd was not in. Witness then went to his office. Mr. Hertz* told witness to go and tell the captain that he would hold him responsible for all injuries done to the sugars in consequence of their detention on the wharf. Witness went to the wharf, and found Mr. Enslow* there. Witness, therefore, told Mr. Enslow the message, and did not deliver it to the captain. Witness heard the conversation between Mr. Enslow and the captain. The captain said, that he had been told that reclamation had been made for loss of weight on a previous consignment by this same vessel by the house of Mordecai & Co. Mr. Enslow positively denied it. Captain Budd was some little distance off. Mr. Enslow told witness that every hogshead of sugar that was in perfect order was to be rolled one side and sent to the store, and to pay freight on those sent to the store on the wharf. The captain of the Eddy was by at the time. Witness took three hogsheads of sugar which were in very good order. Witness, in rolling aside the sugar, saw one hogshead that was crushed. The mate asked witness if he was not going to take that hogshead? Witness answered no, that he would not. Captain Budd asked the negro cooper if that hogshead could be mended? He said no. The bilges of the hogsheads were mashed in. Witness sent three hogsheads he had selected to the store, and went himself to arrange them, and sent the drays back for more; they returned without. Witness then asked Mr. Hertz for money to pay the freight for the hogsheads he had taken. Mr. Hertz refused to give it to him, and told him to return to the wharf, and tell the captain of the Eddy, that he would be held responsible for all injuries resulting to the sugars from detention on the wharf. There were about forty or fifty hogsheads on the wharf about this time. Some of these hogsheads were in a very bad condition—that is, one had a stave broken—others were mashed in, and one had a hoop off. The general appearance of the sugars was bad; the hogsheads looked stained and wet. Witness is in the habit of receiving sugars, and speaks comparatively.

Cross-examined.—The difficulty referred to between Mr. Mordecai and Captain Budd, is this: some time previously a consign-

*Of the house of Mordecai & Co.

ment of sugars was received through Captain Budd. One hogshead of that consignment, when received at the store, was entirely empty. Mr. Mordecai refused to pay freight on that hogshead, and did not pay it. The sugar was examined at the store by Mr. Enslow and one of the port wardens. The freight on this consignment was paid at the house of Mordecai & Co. The captain was discharging when witness went down on the wharf on the morning of the fourth of April; about thirty or forty hogsheads of Mr. Mordecai's parcel were on the wharf. Witness did not remain more than ten minutes on the wharf at this time. The last time witness went to the vessel on that day, was about one o'clock; there were then about forty or fifty hogsheads. The captain was not then discharging; he was standing with Captain Budd on the hogsheads. The hogsheads landed on the wharf could be examined by witness; he had several negro hands with him. About dark the previous evening witness was on the wharf, and received twenty-one barrels of syrup; these were in good order; no freight was paid thereon. The first interview witness had with the captain, he said, "the last time I brought sugars for you, you gave me a great deal of trouble with the payment of freight, and now you must pay freight on the wharf." Witness carried this message to Mr. Hertz, who told him to return with this message, "that he would hold him responsible for the injuries done the sugars on the wharf." Witness only took three hogsheads at the order of Mr. Enslow, because he had but three drays on the wharf. He sent the drays off, each with a load; intending to return for the rest. The next day, witness went on the wharf in the afternoon, about 4½ or 5, and saw no sugars on the wharf. Saw none that had been discharged the day before. It is not the custom of the house of Mordecai & Co. to pay freight on the wharf. They usually receive the goods in their store—inspect them, and see if they are in perfect order. If they are in perfect order, freight is paid thereon; if not, witness reports to his employers, and they make some arrangement about it.

In reply.—Every captain hitherto has acquiesced in this arrangement; they have never had any difficulty before this. Witness delivered the second message sent by Mr. Hertz to the captain of the Eddy about holding him responsible for the injuries resulting to the sugars by detention on the wharf.

(Signed) JAMES SALVO.

Sworn to before me this 24th April, 1854.

R. C. GILCHRIST,
U. S. Commissioner.

April 25, 1854.

Present—Mr. Porter,
" " De Treville,

Charles T. Mitchell, sworn, says:—That he is a merchant in

Charleston, in the habit of receiving consignments. With his house, it has always been customary to deliver the goods on the wharf to the order of the party, and then to call for the payment of freight at a reasonable time after, say a week or ten days—sometimes longer. So far as witness knows, this is the general practice with merchants. The reputation of the house of Mordecai & Co. is very good. Witness would not hesitate to deliver them any amount.

Cross-examined.—If a consignment comes to witness, he usually receives the goods on the wharf, and is not called on for freight till sometime afterwards; sometime not for a month. There is no difference with regard to coastwise vessels. If the goods are in good order, it is the custom to pay for them as soon as called on. If damaged, the captain is forthwith notified—and if the damage is such as falls on the vessel, deduction therefor is made from the freight. Witness has never paid freight on the wharf. If any man was to ask him to do such a thing, he would take it as an insult. It has never been demanded of him. Has never had occasion to demand on his part from any consignee the payment of freight on the wharf; but in one instance, he threatened to do it. Thinks by commercial law, he would have a right to do so, if the party were doubtful as regards their ability to pay, or if he expected to receive any trouble in the collection of freight. When witness receives any goods as consignee, his clerk examines the goods on the wharf, and notifies witness of the damaged ones. When these are received at the store, he personally subjects them to a thorough examination, invariably sending for the captain to be present.

In reply.—Witness never knew of an instance where freight was demanded on the wharf. Has no personal knowledge of usage to that effect.

In reply.—Never heard of any case in Charleston where freight was demanded on the wharf.

In reply.—As to the right to do so, thinks it a question of law. As to the fact, has never heard of a case in which it was done.

(Signed) C. T. MITCHELL.

Sworn before me, this 25th April, 1854.

R. C. GILCHRIST,
U. S. C.

Capt. George T. Trescott, sworn, says:—That he has been a shipmaster in the trade from New Orleans to Charleston, and the Havana trade, for ten or fifteen years. Is now an Inspector of the South Carolina Insurance Company. Was on board the Eddy about 9 or 10 o'clock on the day after she commenced discharging her cargo. Witness examined the stowing of her cargo—went down into the hold: went there as an officer of the Insurance Company: noticed the manner of loading, and thought it bad stowing. Many

of the hogsheads being stowed athwart-ships, and many on their heads. From what witness could see, a large number were so stowed. At least two-thirds of what witness saw were so stowed. Stowing athwart-ships is bad, particularly with sugar and anything liquid, because the casks roll, imbedding themselves into each other, breaking the casks. The mate should superintend the stowing of the cargo; the second mate, if there be one; if not, as was in the case of the Eddy, it is the first mate's.

Witness asked the mate why the hogsheads were so stowed? He replied, that the hogsheads were very heavy, and they had great difficulty in getting them in—that they had been obliged to use jack-screws, which witness thought wrong and unusual.

It is not usual to stow goods athwart-ships; witness would never allow it. They are put in athwart-ships to save labor; it is easier to roll them in. It is usual and best to stow sugar fore and aft; all barrels and hogsheads should be so stowed, with coinings and dunnage between the casks to protect their bilges. There is no way to stow hogsheads athwart-ships to make them as safe as when stowed fore and aft. Does not know if his company has had any question with this vessel on this trip. If there had been, witness would have reported this as bad stowage, and the vessel would have been held responsible. Witness examined the conditions of the hogsheads: some of the staves were thin, not more so than ordinary. Three hogsheads were so perfectly mashed in that the vessel had to furnish new ones. The cargo was generally out of order. Witness saw some three or four hogsheads down in the hold besides the aforementioned ones that were more or less stove. Some of the staves were broken in the middle; such injury cannot be well remedied—it makes a bungling job. Would not, as captain of a vessel, take a hogshead so repaired as in good order. Never knew jack-screws to be used before this in stowing New Orleans sugar; it must mash the hogsheads in. Was ten years in the trade. For the greater part of the ten years, he collected the freight himself, delivering the cargo on the order of the consignee, and afterwards collecting the freight bills. Never demanded freight on the wharf. Thinks it the prevailing practice to discharge and collect freight afterwards.

Cross-examined.—Witness went down to the vessel the second day of the vessel's discharging. Saw several of the consignment to the house of Mordecai & Co. on the wharf, and one particularly in the hold, that was broken; and another on the wharf also broken, with two-thirds of the sugar out. The one broken in the hold was broken in the bilges; it was on the ground tier. The vessel was discharging while witness was there; there were forty or fifty hogsheads on the wharf. The hogsheads were generally stained from drainage. There was a great deal of sugar in the hold—waste sugar from the hogsheads. All the damaged hogsheads could have been coopered—though not to be rendered in as good order as when received. Never, while in the trade, did witness ever bring a cargo

in as bad a condition as this was in. Though witness was in the habit of delivering the freight, and afterwards collecting the freight money, had he ever anticipated difficulty in the collection of it, he would have stored the cargo in the name of the consignee, subject to his order and the payment of freight.

In reply.—The bad condition of this cargo witness attributed wholly to the stowing athwart-ships, and the use of jack-screws.

(Signed) GEO. F. TRESCOT.

Sworn to before me, this 25th April, 1854.

R. C. GILCHRIST,
U. S. C.

APRIL 26th, 1854, at 4½, p. m.

Present, Mr. Porter,
" " De Treville.

John Brady, sworn, says: That he is the wharfinger of Brown's wharf. Witness received from the schooner Mary Eddy 51 hogsheads on the 4th of April, and 48 hogsheads on the 5th, subject to the order of Captain Hinckley or his agent. Witness gave the captain his receipt, stating the condition of the hogsheads: ten of them wanted hoops, also some ("I observed 4,") having broken staves, being thin, bad casks. These hogsheads were in this condition when first stored.

Cross-examined.—Has stored and seen a great deal of sugar in worse hogsheads, and very little in better. Had occasion to roll this sugar to another storehouse, and without any injury; some four or five of them had thin staves; the good hogsheads had no thin staves; those that wanted the hoops were good hogsheads.

(Signed) JOHN BRADY.

Sworn to before me, this 26th April, 1854.

R. C. GILCHRIST,
U. S. C.

Mr. Porter introduced in evidence the several exhibits herewith filed, and marked exhibits "A," "C," and "D."*

Mr. Porter, on the part of the libellant, introduced as evidence the invoice herewith filed, and marked "Exhibit G."

R. C. GILCHRIST,
U. S. C.

April 26th, 1854.

Evidence for respondent.

Present, Mr. Porter,
" " De Treville.

It is admitted by Mr. Porter, on the part of Mordecai & Co., that 21 barrels of syrup, and three hogsheads of sugar, have been received, and no freight paid thereon.

* See the Correspondence in Petition of Appeal.

Seth Cole, sworn, says:—That he is first mate on board the schr. Mary Eddy, running from New Orleans to the port of Charleston, S. C. The cargo of sugars consigned to Mordecai & Co., of 102 hogsheads, was received on the wharf in New Orleans; does not know where the sugars came from. The schooner arrived in Charleston the 31st of March; saw several of the aforesaid hogsheads, about 102, landed on the wharf in as good order as hogsheads of sugar usually are. The barrels of syrup were also landed in good order. The Mary Eddy is a staunch and tight vessel—does not leak of any consequence, not enough to do her good. None of the hogsheads were injured, except by the pressure of the cargo, as hogsheads usually are; not many were pressed in. Those pressed in were coopered as soon as landed, at the instance of the vessel, and made in as good order as the rest of the cargo. There were other sugars for persons other than Mordecai & Co. in no better order than this portion of the cargo, which were delivered to their respective consignees. The captain did not commence discharging his cargo until Monday, the 3rd of April. The barrels of syrup before spoken of were discharged on Monday; does not know whether all were. Thinks that a barrel or two were not discharged until Tuesday. The captain continued to discharge from 7 o'clock in the morning until 4 in the afternoon, until he got through. The cargo was principally hauled away before dark. Mr. Mordecai's sugars were carried away (not by Mordecai & Co.) after sunset. It did not rain while they were discharging. The sugars were stowed in the hold: the syrups were placed on the deck. Saw some one of the house of Mordecai & Co. on the wharf, looking after the sugars, objecting to receive some of the hogsheads, saying they were damaged, and wishing to take others that were very good; thinks he was a partner—was told so by the delivering clerk, and he spoke as one in authority, speaking of the house of Mordecai & Co. as "our house." He objected to receive the hogsheads and pay freight at the same time on the wharf, but that he would pay freight on those in perfect order at "our house," when delivered on the wharf. He refused to receive the sugars, and pay freight on the wharf, but that he would pay freight on them at "our house;" that all the hogsheads must be in perfect order. That he would pay freight on the whole of it if in perfect order; that he would not pay for a portion of it. At the time of this conversation they were discharging, and a number of the hogsheads were on the wharf—about 40 hogsheads.

Cross-examined.—This conversation was with Captain Budd and the captain of the Eddy. Witness superintended the lading of the cargo—part was stowed athwart-ship, thinks about 30 or 40 hogsheads; none of Mr. Mordecai's were so stowed. It is usual to stow sugar athwart-ship; the stevedore used jack-screws; this, also, is usual with sugar. There were chocks under some of the casks not under the bilges of the hogsheads; it is not usual to

put them there. Some of the hogsheads were pressed in by the cargo; none of the staves of this consignment were broken. On Tuesday, 4th of April, 51 of these hogsheads were landed—about one-half. Some of the other consignees paid freight on the wharf as they took away the hogsheads; thinks Mr. Cobia was one of them; thinks he had 30 or 33; did not take them away at one time, but paid as he took them away. None of Mr. Mordecai's consignments formed the ground tier. Does not remember saying to Mr. Mordecai that the ground tier was mashed. Did say to some one while discharging the cargo, that he thought that some of the ground tier was pressed. Does not know the customs of this port; does not think it the usage to pay freight on the wharf—has frequently, however, seen it done.

In reply. The hogsheads were bedded and coined, as is usual, with sugar, and were otherwise properly stowed. Does not pretend to know anything of commercial usage—is only the mate of the vessel. It is not unusual for the captain to refuse to deliver the cargo without payment of freight, if he suspects any difficulty to be thrown in his way in the collection of it.

In reply. Three or four hogsheads were started—is certain that one belonged to Mordecai & Co. Finished discharging sugars on Wednesday, 5th of April, and the cargo on Thursday, 6th April. Mr. Mordecai's cargo went into the hold last, and came out first.

In reply. The hogshead of Mr. Mordecai that was started, was emptied of the sugar in it, which was placed in another good hogshead. No waste was made while the change was being made.

(Signed) SETH COLE.

Sworn to before me, this 10th April, 1854.

R. C. GILCHRIST,
U. S. C.

April 25th, Afternoon session.

James B. Owens, sworn, says: That he was a clerk of T. S. and T. G. Budd at the time of the arrival of the Mary Eddy. Went down to the schooner at the time of her arrival, to deliver the goods and collect the freight. Messrs. Mordecai & Co., S. S. Farrar & Brother, Wm. Enston, Henry Cobia & Co., H. T. Street & Co., were among the consignees. The consignments of Mordecai & Co., and Cobia & Co., S. S. Farrar & Bro., were sugars and molasses. Notice was given to the clerk of Mordecai & Co. of the arrival of their consignment the first day. Mordecai & Co. sent down a clerk to receive the syrups; no freight was paid thereon. The next day, Tuesday, the 4th of April, three hogsheads of sugar were delivered to the clerk of Mr. Mordecai; about forty or fifty hogsheads of Mr. Mordecai's sugar were then on the wharf. No freight was paid on the aforesaid three hogsheads. The agreement between Mr. Enslow and the captain before any of the hogsheads were removed was, that the good hogsheads were to be selected and

put one side, and to pay the freight on all which were selected out, and take them. The proposition came from either Captain Budd or the captain of the Eddy. Witness does not know who made the proposition; he received his orders from Captain Budd. Mr. Mordecai's clerk selected the three hogsheads; Mr. Enslow was by at the time. Mr. Mordecai did not send the drays back that day nor the next. All the hogsheads discharged the first day were stored by the wharfinger at the command of the captain of the Eddy after sunset. The same was done with those discharged the next day. Witness did not demand payment of freight, but told Mr. Mordecai's clerk that the hogsheads would be delivered on the payment of freight. Mr. Cobia paid freight on his consignment on the wharf. Witness was directed not to deliver the consignments of Mordecai & Co. and of Cobia & Co., unless freight was paid on the wharf. Witness delivered the twenty-one barrels of syrup before he received this order.

(Signed) JAMES B. OWENS.

Sworn to before me, this 25th of April, 1854.

R. C. GILCHRIST,
U. S. C.

Captain James Ross, sworn, says:—He is the chairman of port wardens. Was down on the wharf after the survey of the hatches of the Eddy; the survey of the hatches was made on the 31st of April; that of the cargo was made on the 4th. Witness was not down there at all until the 4th of April. The cargo was of sugars. When witness went down, hogsheads were on the wharf. Some of the staves of the hogsheads were very thin. Some of the hogsheads were as thin as any he had ever seen. The stowage was very good. There was a hogshead that was very bad; witness recommended that its contents should be put into another hogshead: he ordered a cooper to do it. Found the cargo well stowed, bedded, coined, &c. The hogsheads pressed in, witness thought, was owing to the thinness of the staves. Saw drainage, but no indication of water on the sugars. The Eddy is a tight, staunch vessel. Witness had several coopers with him; he ordered them to cooper all the hogsheads that required it; he only ordered one hogshead to be started into another. Understood that some of the sugar belonged to Mr. Mordecai and Mr. Cobia. Some hogsheads were bad and some good; understood from the cooper that he had coopered fifty. Must always expect it in a cargo of sugar to have it more or less injured; it almost always requires coopering. Several hogsheads looked as if they had been aboard another vessel before this. Witness was down at the Eddy on the 4th and 5th of April. Has been a captain for many years; has been carrying sugars nearly all his life. The best mode of stowing is fore and aft. When sugar is placed on end, as it sometimes is, they must expect to pay for it. They do it in tight vessels and run the risk.

To stow it athwart-ship is also good. This cargo was stowed fore and aft; some hogsheads athwart-ships. Was down in the hold once—was frequently at the hatchway, and looked down on the cargo. Has traded to this port for a long time. Has known instances where refusals were made to deliver the cargo without payment of freight. On one occasion, Mr. Thos. G. Bubb told Mr. Chafee in witness' presence, that he should not have his goods unless he paid freight; that if he would assure him that there should be no difficulties, he might have it. Mr. Chafee said that he would make none, and gave his word and honor that there should be none. Witness believes he got his goods. Witness made a regular survey, and certified to it. He was requested by the captain of the Eddy to go down to the wharf.

(Signed) JAMES ROSS.

Sworn to before me, this 25th April, 1854.

R. C. GILCHRIST, *U. S. C.*

Charles Linning, sworn, says:—Is one of the wardens of the port of Charleston. Was at the Eddy on the first of April, and found the hatches well secured. Went down on the 4th and 5th, and surveyed the cargo himself; went down into the hold. The cargo consisted of sugars mostly. The hogsheads were well stowed; never saw any better stowed. The cargo generally was well stowed; never saw any better. Has been in this office four or five years, and has some experience in this matter; has been seven years at sea; was mate of a vessel about three years. Saw a great many hogsheads pressed in. The staves were "compressed," which witness thinks was owing to the thinness of the staves. Saw no sign of sea water, but considerable drainage of sugar on the skin of the vessel; the hogsheads were beautifully dunnaged. Some of the upper tier were coined on the ground tier. Saw the hogsheads landed. The hogsheads were not landed in as good condition as he has seen hogsheads come out of a vessel, owing, he thinks, to the thinness of the staves. The cargo was carefully landed. Saw a great many of the hogsheads on the wharf; some of these were coopered and made of a merchantable condition. Some of the hogsheads had one-third of the contents out—one or two of them. Witness tasted the sugar, and perceived no appearance of salt.

(Signed) CHARLES LINNING.

Sworn to before me, this 25th April, 1854.

R. C. GILCHRIST,
U. S. C.

Mr. De Treville, proctor for the schooner Mary Eddy, also introduced in evidence the other exhibits herewith filed, and marked exhibits "B," "E," and "F."*

R. C. GILCHRIST, *U. S. C.*

April 25th, 1854.

* See the Correspondence in Petition of Appeal.

Present, Mr. Porter & McCready, proctors for libellants;
" " De Treville, proctor for respondent.

Captain Thomas S. Budd, sworn, says: His house, the firm of T. S. & T. G. Budd, is the consignee of the schooner Mary Eddy, which arrived here about Saturday, the 1st of April. Witness sent down his discharging clerk on that day. The cargo mostly consisted of sugars—Messrs. Mordecai & Co., H. T. Street & Co., and Cobia & Co., were among the consignees; their consignments were sugars. Witness gave the usual instruction to his delivering clerk, giving notice through the papers to Mr. Mordecai and the other consignees of the arrival of the vessel. Witness was sent for on the 4th of April to go down to the schooner. Witness went down to the wharf, and there saw Mr. Enslow and the captain. Witness told Mr. Enslow, that he was instructed not to deliver the freight off the wharf until freight was paid. Thinks there were then about thirty hogsheads on the wharf. Witness told Mr. Enslow, that he was sorry, but that he would not deliver the freight, unless freight money was paid. Mr. Enslow consented to pay the freight on the wharf, provided the hogsheads were in good order. Saw Mr. Enslow go among the hogsheads and select about fifteen hogsheads. Witness was by at the time, and told Mr. Enslow that he would cooper every hogshead that required it, and if he wished, would start every hogshead into another. Witness then requested the captain to go up with him to Mr. Mordecai's. They found Mr. Mordecai at his desk. Witness told Mr. Mordecai that he regretted the difficulty, and offered to advance the freight to the captain, if he, Mr. Mordecai, would assure him on his honor that would pay him without making any deduction for drainage. Mr. Mordecai replied, that he was not sure that they were in good order; witness acknowledged that many of them wanted coopering, on the wharf, but none were damaged. Witness said, that he was willing to send for the port wardens, and have them inspected on the vessel's account, and that he would have the hogsheads put into such order as would be approved of by the port wardens, at the vessel's expense. Mr. Mordecai refused to submit the matter to the port wardens, alleging that they had nothing to do with an article after it was landed. Witness then offered to leave the matter to the decision of James Chapman, promising to abide by it. Mr. Mordecai offered to leave it to Mr. Samuel Lord or the Chamber of Commerce. Witness objected to Mr. Lord, because he was not as large a ship owner as Mr. Chapman, and to the Chamber of Commerce, because it could not be carried to the wharf to examine the barrels. Witness offered to leave it to Messrs. Cay & Aveilhe, which Mr. Mordecai refused. He then offered to leave it to any other house that they could agree on, and to start the whole cargo, if necessary, rather than have any difficulty. Mr. Mordecai wished, as he said, to receive the consignment in his store, and there subject it to an examination, and if it

agreed with the bill of lading, to pay the freight at his store. This was before any correspondence passed between them.

The above conversation about the payment of freight was excepted to by Mr. Porter, taken subject to the exception. (Exceptions overruled by the Court.)

Witness has been a sailor some time in every capacity. This cargo looked in as good order as any cargoes of sugar generally are, when from New Orleans. Examined the hogsheads with the port wardens. The hogsheads were broken, owing to the thinness of their staves, the rolling of the ship, and loading and unloading. Witness only started one hogshead; does not know whether it was Mr. Mordecai's. When Mr. Mordecai refused to pay freight, he kept his consignment on the wharf until sundown, and then stored it. Some of the sugars were stored that night, and those taken out the next day were stored that day. Saw that every hogshead was put in good order—in such order as he would receive if consignee. Witness has been always ready to deliver the consignment to Mr. Mordecai on payment of freight. The captain of the Eddy had a difficulty with Mordecai & Co. about the payment of freight on a previous trip. When witness went to Mordecai & Co. himself, they paid freight, making such deduction as he, witness, allowed. Mordecai & Co. had the goods in possession several days before they would pay freight. The vessel was ready to start when freight was paid. Mr. Mordecai was absent at the time. When he returned, he told witness, that had he been here he would not have made the settlement which his house did. The goods were in the possession of Mr. Mordecai, and no freight paid thereon from the time the vessel discharged to the time she was ready for sea. The difficuly originated about the contents of a hogshead being washed out. When Mr. Enslow told him what it was, he was astonished that it was such a small matter, so different from what he had heard. They agreed to leave it to Mr. Heriot, which was done, and it was settled in five minutes—freight of that hogshead being deducted, and the rest of the freight was immediately paid. Witness knows of instances where consignments were not delivered without payment of freight on the wharf. It is not, however, a usual thing. Has himself refused in his own business; it is his custom to do so, if he doubts the solvency of the house, or fears a difficulty in the collection of freight, that deductions be exacted. As a master of a vessel, has refused in three instances, in Liverpool, New York, and Charleston, to deliver without payment of freight.

Cross-examined.—On Tuesday, about 30 of Mr. Mordecai's hogsheads were discharged. In the conversation with Mr. Mordecai at his store, Mr. Mordecai asked the captain why they proposed arbitration, if any of the hogsheads were in bad order? Witness answered, that some of them wanted coopering. Mr. Mordecai then said, that he would bring the matter to a point: he then took a pen, and gave his answer in writing, which was the first letter of

the 4th of April. Witness does not consider a hogshead that is to be coopered as damaged cargo; but when the contents are injured in any way, then witness considers it as damaged. If a hogshead is mashed in, and part of the sugar out, he does not consider it as damaged—does not consider the cargo as damaged, but impaired in value. Some of the staves of the hogsheads were mashed in, but not broken.

(Signed) THOS. S. BUDD.

Sworn to before me, this 26th April, 1854.

R. C. GILCHRIST,
U. S. C.

Gustavus Street, sworn, says:—That he is a member of the firm of H. T. Street & Bro. Was a consignee of the Eddy on her last trip. Was called on by Mr. Hertz to go down to the Eddy with Mr. Cohen on the 5th of April. Witness was asked to give his opinion about the condition of Mr. Mordecai's consignment. Several of the hogsheads were on the wharf, others in the hold, and some in the wharf-storehouse. Witness said, that the sugars ought to be coopered, and put into a good receiving order, and then Mordecai & Co. ought to receive them. Mr. Hertz then took witness to his own store to show him some sugars from the same plantation, received by some other vessel, and asked witness to notice that the hogsheads were in a different condition from those received by the Eddy. Witness answered, that the hogsheads were not of as good a make; that the staves of those by the Eddy were very thin. Witness' house often receives consignments of sugars from New Orleans; they generally require coopering. If Mr. Mordecai's consignment had come to his house, he would have received it after the hogsheads had been properly coopered. In the case of small bills, to save the trouble of collecting the freight, witness has ordered it to be paid on the wharf before delivery.

Cross-examined.—Two samples of sugar were produced, which were proved by Mr. Salvo to have been taken from the consignment of Mordecai & Co. One marked "A x 4, 80 Hhds.," the other marked, "Velasco A, 16 Hhds." Mr. Street continues his testimony, and says, that since the 5th of April, the decline in sugar has been about a quarter per cent. per pound, which would be from two to two and a half each hogshead. Starting a hogshead injures it. Shifting the contents of a hogshead not only injures the sugar, but if a large number are started, the absence of the plantation mark might injure the sale of it. This is clarified sugar, which does not drain as much as raw.

(Signed) G. STREET.

Sworn to before me, this 26th April, 1854.

R. C. GILCHRIST,
U. S. C.

Isaac S. Cohen, sworn, says:—That he was called on by Mr. Hertz to examine the hogsheads in the hole of the Eddy, to see how they were stowed. Witness saw several hogsheads on the wharf, some of them required coopering; the generality of them were good. Mr. Hertz went down with him into the hold of the Eddy; noticed the manner in which some of the hogsheads were stowed; some were stowed end-wise, and some cross-wise, which, witness thought, might account for the injury that some of the casks had sustained. The injury that the hogsheads had sustained was nothing more than what witness could expect in such a consignment. Witness went with Mr. Hertz and Mr. Street to the wharf-store; saw some three or four of Mr. Mordecai's hogsheads of sugar, which appeared to be in bad order. When witness went to the wharf, he saw some thirty or forty hogsheads, of which most were Mr. Mordecai's: one was broken in. After surveying the sugar in the wharf-store, witness went to Mr. Hertz's store to look at some hogsheads which had been received by another vessel. Witness remarked, that the staves of those hogsheads were much thicker than those of the Eddy. Had this consignment come to witness, he would have received it after the hogsheads injured had been well coopered. The sugar inspected at Mr. Mordecai's store was of the same character as this sugar. The hogsheads were in no worse condition than they usually are. Witness, in one instance, was refused a consignment unless he paid freight on the wharf. He submitted to it, and sent a young man to pay the freight as the goods were delivered. Witness does not know whether it was paid on the wharf, or at the house of Messrs. Cobia. The final settlement on this consignment was at witness' office, and he there received a receipt in full; subsequently, he settled all other freight bills in the usual way; the general usage is, to deliver the freight to responsible parties, and collect the bill afterwards. Never heard of any exception to this usage, saving his case with Mr. Cobia, and a similar case between Messrs. Cobia & T. G. Budd. When the goods are received in his store, if every thing is right, and the goods are in order, the freight is paid as soon as demanded. The practice is to call for it at any time before the vessel is ready for sea.

Cross-examined.—The sugars produced as Mr. Mordecai's are clarified sugars, which will drain a little; one-third of a hogshead will not, however, drain out. The sugar market is now very dull. Thinks sugar has declined since the 5th of April perhaps one-fourth per cent. Thinks the price of the first quality now produced at that time was 7 cents per pound, and of the second quality 6½. The raw sugars will lose about ten pounds on a hogshead in a voyage from New Orleans to Charleston; these sugars would not lose more than three pounds.

(Signed) I. S. COHEN.

Sworn to before me, this 26th April, 1854.

R. C. GILCHRIST, *U. S. C.*

Decree of District Court.

THE UNITED STATES DISTRICT COURT,
District of South Carolina.

In Admiralty.

MORDECAI & Co.
vs.
Schr. MARY EDDY.

Libel on bill of lading.

Judgment.

The libel filed in this case alleges, among other things, that on or about the 15th of March last, the schr. Mary Eddy, being then in the port of New Orleans, State of Louisiana, and designed on a voyage from that port to the port of Charleston, in this State, a contract was made with the master of that vessel, whereby he agreed, in consideration of certain freight, to convey one hundred and two hogsheads of sugar, of the value of six thousand dollars, to the port of Charleston, and there to deliver the same in good order and condition to the libellants, saving and expecting only the dangers and accidents of the seas and navigation, of whatsoever nature and kind. It was further averred, that on the same day the sugars were delivered in good order to the master of the schr. Mary Eddy, who gave a bill of lading therefor; but the libellants allege, that the said master, not regarding his duty and undertaking to deliver the sugars, hath neglected and refused to deliver the same to them, although they have offered to pay the freight upon their delivery, in accordance with the bill of lading; in consequence of which, the libellants ask a decree for payment of their demand, with costs.

The answer filed by the master of the sch'r Mary Eddy, insists that the sugars mentioned in the bill of lading referred to in the pleadings, are subject to the lien of this respondent, for the specific freight agreed upon in the bill of lading; and avers, among other things, that the sch'r Mary Eddy arrived at the port of Charleston, on the thirty-first day of March last, with the sugars, and twenty-one barrels of syrup, also embraced in the bill of lading, in good order on board, of which he immediately notified the libellants, and offered to deliver the same in good order to them, upon the payment of the freight due thereon, according to the bill of lading thereof. That afterwards, to wit, on the third and fourth days of April, the libellants having received at the wharf where they were landed the twenty-one barrels of syrup and three hogsheads of sugars, refused to pay the freight due on the same; that thereupon, the respondent declined to deliver the residue of the sugars to the libellants, until the freight due thereon, as well as the freight due on the merchandise previously delivered, should be paid or secured

to be paid to him. That afterwards, to wit, on the fourth day of April last, no portion of the freight due on the libellants' importation having in the meantime been paid or secured, and the libellants having refused to pay the same, until the sugars were removed by them to their store, or until they had obtained possession of them, the respondent proceeded to unload the residue of the sugars, and when they were landed on the wharf, gave reasonable notice to the libellants that they would be delivered to them in good order on the payment of the freight due on their importation; and the libellants refusing to pay the same, or to give security therefor, the respondent retained, and still retains, the residue of the sugars in his custody, that his lien thereon should not be lost.

These pleadings purport to raise the question as to the extent of the responsibility of a common carrier for the delivery of goods confided to him, and the nature of his lien for the payment of freight; but the points in the case are not as distinctly developed by the pleadings as they appear in the testimony at the reference before the commissioner, and in the argument of counsel on the hearing before the Court.

The general principle of law, that the lien for freight attaches whether payment of it is to precede or be concomitant with the delivery of the cargo, is well settled. By stipulation in bills of lading, that the goods shall be delivered to the consignees, they paying the freight, the owner of the vessel may detain the cargo until payment of the freight, the delivery of the cargo and the payment of the freight being concomitant acts, which neither party is obliged to perform, without the other being ready to perform the corelative act, [*a.*] But the libellants appear to have considered, at the commencement of this controvery with the respondent, that there was a usage of the port of Charleston which would affect the right of the ship-master to demand freight upon the delivery of the cargo on the wharf—that is, that in conformity with the supposed usage, they were entitled to the possession of the merchandise in the stores before freight was demandable of them; and accordingly, they informed the respondent in a letter from them, of the 4th ultimo, that if he refuses "to deliver the sugars in accordance with the usages of the port, they should at once hold the vessel and owners liable for all damages that accrue." As there has been no testimony to prove the existence of any other usage than the one already referred to, it is presumed that the libellants had reference to that supposed usage when they wrote their note; but if so, their views are not sustained by the testimony reported by the commissioner. Two witnesses were examined on this point in behalf of the libellants: one of whom stated, that he thinks that by commercial law he would have a right to demand freight on the wharf, if the party were doubtful as regards their ability to pay, or if he expected to receive any trouble in the collection of the freight;

[*a.*] Yates and others, Assignees, &c., vs. Ralston, 8 Taunton, p. 293.

that as to the right to demand freight on the wharf, he thinks it a question of law; that as to the fact, he has never heard of a case in which it was done. The other witness stated, that he thinks it is the prevailing practice to discharge and collect freight afterwards; but that though such was his practice, if he ever anticipated difficulty in the collection of freight, he would have stored the cargo in the name of the consignee, subject to his order and the payment of freight. In opposition to this testimony, four witnesses have been examined in behalf of the respondent, one of whom stated that he has known instances where refusals were made to deliver the cargo without payment of freight. Another witness stated, that he knows of instances where consignments were not delivered without payment of freight on the wharf; that it is his custom to do so, if he doubts the solvency of the house, or fears difficulty in the collection of freight. Another witness stated, that in the case of small bills, to save the trouble of collecting the freight, he has ordered it to be paid on the wharf before delivering of the cargo; and the fourth witness stated, that in one instance, he was refused a consignment unless he paid freight on the wharf, but that the general usage is otherwise—the practice being to call for the freight at any time before the vessel is ready for sea. Now, it cannot be seriously contended on this testimony, that there is satisfactory evidence of a well established and generally well known custom and usage of the port of Charleston, to affect the principle of law hereinbefore laid down as to the delivery of the cargo and the payment of freight being concomitant acts. On the authority of Rushford vs. Hadfield, [*b*,] Angell, in the law of carriers, page 298, maintains that "the doctrine in respect to all commercial usage is, that to have it take the place of general law, it must be so uniformly acquiesced in by length of time, that the jury will feel themselves constrained to say that it entered into the minds of the parties and made a part of the contract." The libellants having failed to prove the existence of such usage, I hold that the ship master has a lien for the payment of the freight on each portion of the consignment as it may be delivered; and whether the delivery be on the wharf or elsewhere, provided the owner of the cargo is willing to receive the same in parcels.

Thus, for instance, to apply this principle of law to the circumstances of the case before the Court: twenty-one barrels of syrup were delivered to the libellants on the 3rd of April last, and three hogsheads of sugar on the following day. For these parcels of consignment, the respondent was entitled to the payment of the freight on the wharf, at the time of the delivery thereof, and he accordingly demanded it from the libellants.

This claim was, however, rejected by them, and the respondent, in consequence thereof, refusing to deliver any other parcels of the consignment, the proctors of the libellants, on the 4th ultimo, at

[*b*.] East; reports 7, vol.———, p. 229–230.

half-past 7 o'clock, P. M., addressed a letter to the respondent, in which they state that they are instructed by the libellants to inform him that they consider their whole consignment of sugars—that on the wharf as well as that in the ship—at the risk of the schooner Mary Eddy and owners; and that they are ready to pay him the freight upon his delivery to them of the entire consignment, in accordance with the bill of lading—the letter concluding with a statement, that they are also instructed by the libellants to inform him that unless this matter is adjusted to their satisfaction by ten o'clock the next day, they will proceed to libel the vessel.

This letter gives a very different aspect to the case before the Court from that in which I have been considering it. The libellants do not here rest their claim upon a custom which has not been and cannot be proven to exist; but they assume a ground which is sustained by principle and by authority. The late Mr. Justice Story, in the case of certain logs of mahogany, (2d Sumner, Reports, p. 601,) says: "It is well known that the goods of the shipper may not only be detained for freight, properly so called, but also for hire agreed to be paid by the shipper under a charter party for the use of the ship, if the owner of the ship retains possession of the cargo; and that the shipper cannot ordinarily insist on a delivery of the goods to him until the freight or hire is paid or secured according to the terms of agreement. But then the owner is not at liberty to insist that the goods shall not be landed before such payment or security is made. On the contrary, the shipper has a right, as it should seem by the maritime law, to insist upon examining the goods after they are unlivered, in order to ascertain whether they are damaged or not, before he makes himself liable at all events for the freight. Under such circumstances, an unlivery of the cargo becomes perfectly proper; and after it is made, the owner of the ship has a right to detain it in his custody until payment or security for the freight So the law is laid down in Lord Tenterdon's Treatise on Shipping, (Abbot on Shipping, p. 3, ch. 3, sec. 11, pp. 247, 248;) and it appears to be the general rule adopted by foreign maritime nations. In the maritime ordinance of Louis XIV., (1 Valin, lib. 111, tit. 3, art. 21, p. 665,) it is expressly prescribed that the master shall not retain the merchandise on board his vessel for default of payment of the freight; but he may at the time of the discharge refuse to deliver it, or cause it to be held for the freight; and Valin gives as the reason, that it would be absurd to allow the master to insist upon the payment of his freight before the goods were examined, and the damage, if any, ascertained. The modern code of France, (lib. 11, tit. 8, art. 306,) contains a provision very similar in its purport and objects. It declares that the master shall not retain the merchandise on board of his ship for default of the payment of freight; but he may at the time of discharging insist upon having them deposited in the hands of a third person until the freight is payed. The commentators

give the same reason for this provision which is assigned by Valin. Now, what should have been the respondent's course of proceeding after receiving a letter of the libellants' proctors. The time given by them for a satisfactory adjustment of the matters in dispute is, it is true, rather brief—the letter being written at half-past 7 o'clock one evening, and the arrangement required to be effected by 10 o'clock the next morning. But I apprehend that it was in the power of the respondent to submit to the inspection of the libellants, at all events, in the course of the day named, if not by the precise time fixed by them for a settlement, the whole of their importation by the Mary Eddy, and this he certainly should have done. There were landed on the 4th of April fifty-one hogsheads of their sugar, and on the following day, (the 5th,) forty-eight additional hogsheads, three hogsheads of sugar and twenty-one barrels of syrup having been previously delivered to the libellants. But, although the whole importation of the libellants was thus landed, there is no evidence of an offer afterwards on the part of the respondent to deliver it in accordance with the requirements contained in the letter of the libellants' proctors. In fact, that the letter seems to have closed the correspondence between the parties, and the aid of the Court was shortly afterwards invoked.

I cannot conceive the reasons of the respondent's disregarding the demand made by the libellants through their proctors, when their compliance with it would have given a very different complexion to this case. But the Court cannot speculate as to reasons, and must decide the case as it is presented to its judgment. Giving it, therefore, all due reflection, I have come to the conclusion, that on the last ground considered, I must pronounce in favor of the libellants with cost, which is accordingly done.

Mr. Gray, the commissioner and clerk of this Court, will ascertain the charges to be made against the respective parties to this suit, and state the account between them. For this purpose, he is authorized to use the testimony already reported, and such further evidence as may be brought before him in relation to this point.

(Signed) R. B. GILCHRIST,
D. J.

At Charleston, 16th May, 1854.

Appeal to Circ't Ct.

The Sch'r Mary Eddy,
J. W. Hinckley, Claimant and Respondent,
ads.
Mordecai & Co., Libellants.

The above-named respondent, conceiving himself aggrieved by the final sentence or decree filed on the 16th day of May, 1854, in the above-entitled case, doth hereby appeal therefrom to the next Circuit Court of the United States, to be held in and for the

said district: and he prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings in the cause, duly authenticated, may be sent to the said Circuit Court.

E. DE TREVILLE,
Respondt's Proct'r.

Filed 24 May, 1854.

Appeal bond to Circuit Ct.

THE UNITED STATES OF AMERICA,
South Carolina District:

Know all men by these presents, that we, Jacob W. Hinckley, Thomas S. Budd, and T. G. Budd, are held and firmly bound to Moses C. Mordecai, Isaac E. Hertz, Joseph A. Enslow, and Isaac R. Mordecai, partners, trading under the firm of Mordecai & Co., in the full and just sum of eight thousand dollars, to be paid to the said Mordecai & Co., their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents:

Sealed with our seals, and dated the ninth day of June, A. D. one thousand eight hundred and fifty-four.

Whereas, a libel was lately filed in the Court of Admiralty for the district of South Carolina, by the said Mordecai & Co., against the schooner Mary Eddy, for a cause of maritime jurisdiction on a bill of lading for the delivery of one hundred and two hogsheads of sugar, and twenty-one barrels of syrup, to the said Mordecai & Co.; and Jacob W. Hinckley, master, interposed a claim to the said schooner, in behalf of the owners, and defended the said suit, and by the decree of the Court was adjudged to pay damages and costs to the libellants; and whereas, the said claimant has appealed from the decree of the said Court to the Circuit Court of the United States;

Now the condition of the above obligation is, that if the said Jacob W. Hinckley shall prosecute the said appeal, and shall ratify and confirm all acts which his proctors may do in the premises in this behalf, and also appear in the said Court as often as he may be required, and pay or cause to be paid all damages, costs, charges, and expenses that shall be decreed, assessed, or taxed against him, and in every respect abide by and perform the decision of the said Court, then this obligaton to be null and void; otherwise to remain in full force and effect. And the said Thomas S. Budd and T. G. Budd do hereby consent, that in case the said Jacob W. Hinckley shall fail to prosecute his appeal with success, and to comply with the decree aforesaid, that execution may issue against them, the

said Thomas S. Budd and T. G. Budd, for the full amount of the said decree, [and costs,] damages, and costs.

J. W. HINCKLEY, [L. S.]
THOS. S. BUDD, [L. S.]
T. G. BUDD. [L. S.]

Sealed and delivered in presence of
H. Y. GRAY,
U. S. Com'r and Cir. and Dis't Clk.

The words "and costs," in line next to last, being first erased.

Approved:

R. B. GILCHRIST, *D. J.*

June 9th, 1854.

Citation to Circ't Ct.

To Messrs. Mordecai & Co., greeting:

You are hereby cited and admonished to be and appear at a Circuit Court of the United States, to be held at Columbia, in and for the district of South Carolina, on the fourth Monday of November next, pursuant to an appeal from a decree of the District Court of the United States for said district, wherein the master and owners of the sch'r Mary Eddy are the appellants, and you are appellees, to shew cause, if any there be, why the said decree should not be reversed, and speedy justice done to the parties in that behalf.

Witness the Hon. Robert B. Gilchrist, Judge of the United States for the district of South Carolina, 9th June, A. D. 1854.

R. B. GILCHRIST,
Judge of the U. States for So. Ca. District.

We accept service of this citation.

BROWN & PORTER.

12 June, 1854.

Petition of Appeal.

THE UNITED STATES OF AMERICA,
Sixth Circuit.

THE MASTER AND OWNERS OF THE SCHR. MARY EDDY, Appellants,
vs.
MORDECAI & CO., Appellees.

To the Honorable James M. Wayne, Associate Justice of the Supreme Court, and Judge of the Sixth Circuit:

The humble petition and appeal of Jacob W. Hinckley, master

of the schooner Mary Eddy, for W. and N. Lindsay, owners of the said schooner, sheweth: That the said schooner Mary Eddy, arrived in the port of Charleston on the 31st day of March, 1854, from New Orleans, with a cargo consisting, in part, of one hundred and two hogsheads of sugar, and twenty-one barrels of syrup, for which your petitioner had signed bills of lading, deliverable in Charleston, to Mordecai & Co., upon payment of freight, to wit, six dollars per hogshead on sugar, and one dollar and forty cents per barrel on syrup. That, on Monday, the 3d day of April, your petitioner, in pursuance of previous notice to the consignees, began to land his cargo, and on that day the syrup was landed and taken away by Mordecai & Co. That, on the next day, the 4th day of April, forty or fifty hogsheads of the sugar consigned to Mordecai & Co. were landed, and your petitioner directed his mate to demand the freight on delivery; whereupon, an altercation arose with Mordecai & Co., who insisted that the cargo should be delivered to them before the freight could be demanded; and that they would not pay the freight until they had the opportunity of inspecting the produce at their leisure, and had the cargo for this purpose in their possession, founding their claim on the custom of the port, and on a supposed common right, to set off against the freight the damages of the cargo, if any had occurred. That after a parley between the mate and the clerk of Mordecai & Co., about a compromise and the payment of freight, *pro rata*, on such part of the cargo as Mordecai & Co. might choose to take, Captain Budd, the consignee of the said schooner, called on Mr. Mordecai, the head of the house of Mordecai & Co., who, with the view of bringing the matter, as he said, to a point, wrote the following note:

"*Charleston, April* 4, 1854.

"Capt. J. W. HINCKLEY,
"Schr. Mary Eddy.

"Sir: Upon the delivery of the sugar on board of your vessel to our consignment, in accordance with your bill lading, we will pay you the freight on them. If you refuse to deliver the sugars in accordance with the usages of the port, we shall at once hold the vessel and owners liable for all damages that accrue.

"Your obedient servant,
"M. C. MORDECAI,
of MORDECAI & Co."

That to this note your petitioner returned at first this answer:

"*Charleston, April* 4, 1854.

"Messrs. M. C. MORDECAI & Co.

"Gentlemen: Your note of this day's date is at hand—contents noted. In reply to the same, will inform you, your sugars are not

ready for delivery; many of the hogsheads require coopering. When the same are in the usual order, you will be notified by

"Your obedient servant,

"J. W. HINCKLEY."

And in course of the morning, having coopered the hogsheads that appeared to be injured, he sent the following note:

"*Charleston, April* 4, 1854.

"Messrs. M. C. MORDECAI & Co.

"Gentlemen: We hereby notify you that your sugars are now in good order, having employed a cooper to put them in the usual condition as other vessels deliver their cargo. To avoid any difficulty in collecting my freight, you will oblige me by paying the amount due my schr. Mary Eddy as per bill of lading—for they will not be delivered without settling the just amount due. Should you not accede to the above, and settle the matter, the sugars will remain on the wharf until sunset, and then be stored at your expense and risk."

"Respectfully yours, &c.,

"JACOB W. HINCKLEY,

"Commander of schr. Mary Eddy."

To which note, on the same day, Mordecai & Co. replied as follows:

"*Charleston, April* 4, 1854.

"Capt. J. W. HINCKLEY,

"Schr. Mary Eddy.

"Sir,: Your letter of this date, in answer to ours of same, you handed us in person at half-past one o'clock. Your last letter of this date was handed to us after two o'clock. We have only to reply that we are prepared to give you satisfactory security for your freight money to be paid to you in accordance with the usages of this port, and upon your delivery of our property in compliance with your contract. If you refuse to do so, we shall hold you responsible for all damages; and we would further add, that we are informed that there are a large number of hogsheads of sugar on the wharf, and a notice of their being landed at this late hour will not give us time to dray them away, and store them, and therefore we hold you responsible for any damage on those that are landed."

"Yours, respectfully,

"MORDECAI & CO."

That the sugars remained on the wharf until sundown, and were then stored by your petitioner; after which, the following note was sent by the solicitors of Mordecai & Co:

"Capt. J. W. HINCKLEY.

"Sir: We are instructed by Messrs. Mordecai & Co. to inform you

that they consider their whole consignment of sugar—that on the wharf as well as that in the ship—at the risk of the schooner Mary Eddy and her owners; and that they are ready to pay you the freight upon your delivery to them of the entire consignment in accordance with the bill of lading. That from your own admissions and conduct, they have reason to believe that part of the consignment is not in the condition you received it, and they have further reason to believe that this damage is not included within the dangers and accidents of the seas and navigation. That they are willing to give any security for the freight, but will not consent to pay the freight as you have demanded in your letter, when a larger portion of the consignment is in your possession, under circumstances which authorize them to believe that they may sustain considerable damage. We are also instructed to inform you, that unless this matter is adjusted to their satisfaction by 10 o'clock to-morrow, they will proceed to libel the vessel."

"Very respectfully, your obedient servants,

"BROWN & PORTER,

Attorneys at Law."

April 4, 7½ *o'clock, P. M.*

That the sugars were examined next day, in store and on the wharf, by the agents of Mordecai & Co., but no demand was made, nor any freight tendered. That the libel was filed on the 6th day of April, 1854, and alleges, that on or about the 15th March, 1854, the said schooner Mary Eddy being then in the port of New Orleans, and designed on a voyage from that port to the port of Charleston, a contract was made with J. W. Hinckley, the master of said schooner, whereby he agreed, in consideration of certain freight, to convey one hundred and two hogsheads of sugar of the value of six thousand dollars, to the port of Charleston, and there to deliver the same in good order and condition to Mordecai & Co., saving and excepting only the dangers and accidents of the seas and navigation of whatsoever nature and kind. That on the same day the sugars were delivered in good order to the said master, who gave a bill of lading therefor. That the said master, not regarding his duty and undertaking to deliver the sugars, hath neglected and refused to deliver the same to the said Mordecai & Co., although they have offered to pay the freight upon their delivery, in accordance with the bill of lading; in consequence of which, the libellants ask a decree for payment of their demand, with costs.

That a claim and answer was filed by your petitioner on the 10th day of April, 1854, admitting that the said schooner Mary Eddy arrived at the port of Charleston on the 31st day of March, 1854, with the said sugars, and also alleging that twenty-one barrels of syrup are embraced in the said bill of lading, and that they were all in good order on board, of which the libellants had notice, and

averring that he had offered to deliver the same in good order to the libellants upon the payment of freight due thereon, according to the bill of lading. That on the 3rd and 4th days of April, 1854, the libellants received at the wharf, where they were landed, the twenty-one barrels of syrup, and also three hogsheads of sugar, but refused to pay the freight due on the same; that thereupon your petitioner declined to deliver the residue of the sugars to libellants until the freight due thereon, as well as the freight due on the merchandise previously delivered, shoud be paid or secured to be paid him. That on the 4th day of April, 1854—no portion of the freight due on the consignment of libellants having, in the meantime, been paid or secured, and the libellants having refused to pay the same until the sugars were removed by them to their store, or until they had obtained possession of them—your petitioner proceeded to unlade the residue of the sugars, and that when they were landed on the wharf, gave reasonable notice to libellants that they would be delivered to them in good order on the payment of the freight due thereon. That the libellants refusing to pay the same, your petitioner retained and still retains the residue of the sugars in his custody, that his lien thereon should not be lost. That your petitioner has, at all times, been ready, and still is ready, to deliver the said sugars, or cause the same to be delivered, to the libellants on their paying the freight due thereon. That the said sugars are subject to the lien of your petitioner for the specific freight agreed upon in the bill of lading.

That the cause came on to be heard before his Honor, Robert B. Gilchrist, District Judge, on the 3rd and 4th days of May, 1854, when the libellants entered into evidence to prove a custom in the port of Charleston, to the effect that sugars are to be delivered before the freight is payable, in which they failed. They also entered into evidence and examined witnesses to prove that the sugars were damaged by bad stowage, in which they also failed—as by the evidence taken in the cause, and hereto annexed, will more fully appear. That it then appeared that the supposed custom is defended on the ground that any damage which the goods may have sustained by the default of the ship is a set-off against the freight. But though the libellants introduced much evidence to establish the custom, and to establish the fact of damage done to the cargo, they failed on both points, insomuch, that the cause came at last to an issue on the mere right of the consignee to the possession of the goods discharged from any lien of the ship before the title to the freight accrues; and therefore, the decree should have been, that the libel be dismissed with costs. Nevertheless, his honor decreed for the libellants, and condemned the ship in costs, and ordered an inquiry to ascertain the damages incurred by the non-delivery of the cargo. That the said decree rests on the sole ground that the letter of the solicitors is a demand of the cargo, accompanied by a tender of the freight; whereas your petitioner insists that the

said letter is not a withdrawal of the claim set up by the libellants in the first instance; that it was not so understood by the respondent nor by the libellants; that so far from withdrawing the claim to a delivery before payment, the very letter reiterates the claim; and the same contention was put forward, both by evidence and argument, in the defence at the hearing. And your petitioner submits to your honor, that no inference unfavorable to him can be drawn from his declining to answer the said letter, because, in fact, it required no answer; and if it had been intended as a waiver of the ground originally taken by the libellants, it could have had no effect unless followed up by a demand of the goods, and a tender of freight. That your petitioner, so far from refusing to deliver the goods on payment of the freight, had even been willing to go to the point of extreme concession by receiving freight distributively on the parcels as delivered, and had no possible motive or interest, nor ever meant, to refuse, or ever did refuse, a tender of the freight. That on the other hand, the libellants never intended to make any tender, but made, and intended to make, an issue with your petitioner on the right to retain the goods for the payment of the freight. That your petitioner, therefore, humbly appeals from the said decree; and prays that the same may be reversed, and that the libellants' libel may be dismissed with costs, and your petitioner may be restored to all things which he has lost by said decree.

And your petitioner, as in duty bound, will ever pray, &c.

E. DE TREVILLE,
Appellants' Proctor.

Hearing in Circuit C't.

In the Circuit Court.

WEDNESDAY, 2d May, 1855.

The Court met, &c. Present, his Honor, James M. Wayne.

MORDECAI & Co.
vs.
THE SCH'R MARY EDDY.

Appeal from the District Court.

Mr. E. De Treville read the pleadings, and was heard for the respondents. Mr. Porter was heard for the libellants.

The Court adjourned.

THURSDAY, 3d May, 1855.

The Court met, &c. Present, his Honor, J. M. Wayne.

MORDECAI & Co.
vs.
THE SCH'R. MARY EDDY.

Mr. McCrady was heard for the libellants, Mordecai & Co.

Adjourned.

FRIDAY, 4th May, 1855.

The Court met, &c. Present, his Honor, James M. Wayne.

MORDECAI & CO.
vs.
THE SCH'R MARY EDDY.

Mr. Petigru was heard in reply for the respondents, the appellants.

Adjourned.

Decree of Circuit Court.

FRIDAY, 1st June, 1855.

The Court met, &c. Present, his Honor James M. Wayne.

THE MASTER AND OWNERS OF THE SCH'R MARY EDDY, Appellants,
vs.
MORDECAI & CO., Appellees.

This cause having been heard upon the appeal, it is adjudged, ordered, and decreed, that the decree of the District Court be reversed, and that the libel of the appellees be dismissed with costs.

(Signed) JAMES M. WAYNE,
Asoc. Justice Sup. Ct. U. States.

Adjourned.
Filed 29th May, 1855.

Appeal to Supreme Court.

Circuit Court of the United States for the Sixth Circuit and District of South Carolina.

In Admiralty.

MORDECAI & CO.
vs.
THE SCHOONER MARY EDDY, her tackle, apparel, & so forth.

Mordecai & Co., to the Honorable the Chief Justice and the Associates Justices of the Supreme Court of the United States.

The above-named Mordecai & Co., the libellants, conceiving themselves aggrieved by the final sentence or decree entered on the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and fifty-five, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States;

and he prays that this, his appeal, may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court.

BROWN & PORTER,
Proctor for Appellants.

8th June, 1855.

Appeal-bond to Supreme Court.

UNITED STATES OF AMERICA,
South Carolina District.

Know all men by these presents, that we, Moses C. Mordecai, I. E. Hertz, J. A. Enslow, and I. R. Mordecai, trading under the firm of Mordecai & Co., and J. C. Farrar, are held, and firmly bound unto W. & N. Lindsay, in the full and just sum of fifteen hundred dollars lawful money of the United States, to be paid to the said W. & N. Lindsay, or their certain attorney, executors, administrators, and assigns, to which payment, well and truly to be made and done, we bind ourselves, and each and every of our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the eighth day of June, A. D. one thousand eight hundred and fifty-five.

Whereas, a libel was lately filed in the District Court of the United States for South Carolina District, by the above-named Mordecai & Company, against the sch'r "Mary Eddy," her tackle, apparel, &c., and the above-named W. & N. Lindsay came and claimed to be the sole and lawful owners thereof; and the said Court, on the 16th of May, A. D. 1854, did pronounce a decree in favor of the said libellants, with costs; and whereas, the said W. & N. Lindsay, the claimants of the schooner "Mary Eddy," afterwards interposed an appeal to the Circuit Court of the United States for the said district, which was allowed, and the said Circuit Court, after hearing argument upon the appeal, did order and decree "that the decree of the District Court be reversed, and that the libel of the appellees be dismissed with costs;" and whereas, the said Mordecai & Co. have interposed an appeal to the Supreme Court of the United States, to be holden at Washington:

Now, the condition of the above obligation is such, that if the aforesaid Mordecai & Co. shall prosecute their appeal to effect, and answer and pay all such damages and costs as shall be adjudged and decreed by the said Supreme Court, if they fail to make their plea good, and in all respects conform to and abide by such order or orders as may be made in the premises, then, and in such case, the

foregoing obligation shall be void, or else to be and remain in full force and virtue.

M. C. MORDECAI, [L. S.]
I. E. HERTZ, [L. S.]
J. A. ENSLOW, [L. S.]
I. R. MORDECAI, [L. S.]
J. C. FARRAR. [L. S.]

Sealed and delivered in the presence of—
Witness to signature of Farrar,
F. L. ROUX.
Witness to signature of Mordecai & Co.,
C. W. CLEAPOR.
Acknowledged before me, this 8th June, 1855.

H. Y. GRAY,
Cl'k Cir. C't.

Citation.

UNITED STATES OF AMERICA.

To. W. and N. Lindsay, owners of the schooner Mary Eddy, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, on the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-five, pursuant to an appeal from a decree of the Circuit Court of the United States for the district of South Carolina, wherein Mordecai and Company are appellants, and you are appellees, to shew cause, if any there be, why the said decree should not be corrected, and speedy justice be done to the parties in that behalf.

Witness my hand at Charleston, this eighth day of June, in the year of our Lord one thousand eight hundred and fifty-five.

R. B. GILCHRIST,
Judge of the United States for the District of South Carolina.

Citation.—Filed 8th June, 1855.

MORDECAI & Co.
vs.
SCH'R MARY EDDY.

OFFICE OF THE CLERK OF THE CIRCUIT COURT,
South Carolina District:

I, Henry Y. Gray, clerk of the Circuit Court of the United States, for the 6th circuit, South Carolina District, do hereby certify that the foregoing is a full, true, and complete transcript of the records,

evidence, and proceedings had in the district and Circuit Courts for the aforesaid district in the above-mentioned cause, herewith transmitted to the Supreme Court of the United States, in pursuance of the notice of appeal hereunto annexed.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the said Circuit Court, at [SEAL.] office in the city of Charleston, district aforesaid, this twenty-second of November, A. D. one thousand eight hundred and fifty-five.

H. Y. GRAY,
Clerk.